

PRELIMINARY HEARINGS — Purposes of preliminary hearing and grand jury are the same, but procedures are different.....Revised 12/2009

The Fifth Amendment to the United States Constitution requires all federal prosecutions to be commenced by indictment, but that constitutional guarantee does not apply to the states. *McKaney v. Foreman*, 209 Ariz. 268, 270, ¶ 11, 100 P.3d 18, 20 (2004); *State v. Nichols*, 201 Ariz. 234, 236, ¶ 10, 33 P.3d 1172, 1174 (App. 2001). It is well established that “prosecution for felony crimes in Arizona may be commenced by either of two alternate methods.” *Gershon v. Broomfield*, 131 Ariz. 507, 510, 642 P.2d 852, 855 (1982); Arizona Constitution, Article 2, § 30;¹ A.R.S. § 11-532(A);² Rule 2.2, Ariz. R. Crim. P.³ That is, in Arizona, a defendant may find himself facing a felony trial as a result of either a preliminary

¹ Article 2, § 30 of the Arizona Constitution provides:

Indictment or information; preliminary examination. No person shall be prosecuted criminally in any court of record for felony or misdemeanor, otherwise than by information or indictment; no person shall be prosecuted for felony by information without having had a preliminary examination before a magistrate or having waived such preliminary examination.

² A.R.S. § 11-532(A)(4) states that the county attorney’s duties include “[d]raw[ing] indictments and informations.”

³ Rule 2.2 of the Arizona Rules of Criminal Procedure states:

Felony actions may be commenced:

- a. By indictment, which may or may not be preceded by a complaint; or
- b. By the filing of a complaint before a magistrate in a limited jurisdiction court, or in a court of record with permission of the judge of such court.

hearing or by virtue of a grand jury indictment, whichever the State chooses. "The decision to proceed by information or indictment is the state's choice." *State v. Sisneros*, 137 Ariz. 323, 325, 670 P.2d 721, 723 (1983).

"The purpose of a preliminary hearing and a grand jury proceeding is the same. They are to determine whether there is probable cause to believe the individual committed an offense." *State v. Neese*, 126 Ariz. 499, 502, 616 P.2d 959, 962 (App. 1980). "Either method – indictment by grand jury or information after preliminary hearing – is constitutionally proper." *State v. Bojorquez*, 111 Ariz. 549, 553, 535 P.2d 6, 10 (1975).

In *Gershon v. Broomfield*, 131 Ariz. 507, 510, 642 P.2d 852, 855 (1982), the Arizona Supreme Court explained the differences between commencing a criminal case by an indictment and by filing a complaint:

The grand jury proceeds in secret until an indictment is returned, filed, and served. See A.R.S. §§ 13-2812, -2813. The finding of probable cause that supports the indictment is arrived at largely without judicial supervision, under more relaxed rules of evidence, and with the grand jury normally hearing only one version of the transaction. See Rule 12, Arizona Rules of Criminal Procedure. If the prosecutor chooses the other course of prosecution, by information, a complaint laid before a magistrate requires a finding of reasonable cause before issuance of process, and the defendant will not be bound over to the superior court for trial without a magistrate's finding of probable cause after a preliminary hearing. See Rule 5, Arizona Rules of Criminal Procedure. At the preliminary hearing, the accused may be present, be represented by counsel, and confront and cross-examine witnesses; the accused also has a qualified right to testify on his or her own behalf and to compel witnesses to testify on behalf of the defense. Rule 5.3(a), Arizona Rules of Criminal Procedure. All these constitutional rights are not afforded to the accused under the grand jury method of prosecution until after the accused has a public record of felony accusation.

Id. at 510, 642 P.2d at 855.

Grand jury confidentiality is enforced by A.R.S. §§ 13-2812 and 13-2813. Those statutes criminalize disclosure of the “nature or substance of any grand jury testimony or any decision, result or other matter attending a grand jury proceeding,” and “unlawful disclosure of an indictment, information or complaint” as a class one misdemeanor, unless the disclosure is made in the proper discharge of official duties.